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# Robert Pierce et al v. Robert W. Pepper et al : Brief of Respondent

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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ROBERT PIERCE, E. A. TIFFANY, FRED  
WALTERS and DEWAYNE WALTERS,  
aka WAYNE WALTERS,

Plaintiffs and Respondents,

vs.

ROBERT W. PEPPER, dba R. W. PEPPER  
CONSTRUCTION COMPANY,

Defendant,

and

MAJESTIC CORPORATION, a Utah Cor-  
poration,

UNIVERSITY OF UTAH Defendant and Appellant.

CASE  
NO. 10209

FILED  
MAR 31 1965

APR 29 1965

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## RESPONDENT'S BRIEF

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Clerk, Supreme Court, Utah

Appeal from the Judgment entered by  
The Fourth District Court, Utah County, State of Utah  
Honorable R. L. Tuckett, Judge

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Defendant and Appellant.

**CASE**  
**NO. 10209**

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## RESPONDENT'S BRIEF

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### STATEMENT OF KIND OF CASE

This action is for the purpose of recovering unpaid wages earned by the plaintiffs upon a project in Tooele, Utah, owned by the defendant Majestic Corporation and upon which it did not require the contractor to obtain a bond as required by 14-4-1 Utah Code Annotated, 1953.

## **DISPOSITION IN LOWER COURT**

Judge R. L. Tuckett of the Fourth District Court found in favor of the plaintiffs and against the defendants upon the grounds that the bonding statute imposed statutory liability upon the owner, Majestic Corporation, and that the releases and lien waivers signed by the plaintiffs were not enforceable because there was no consideration given for such releases.

## **RELIEF SOUGHT ON APPEAL**

The plaintiffs seek to have the judgment entered by the lower court against the defendant Majestic Corporation sustained.

## **STATEMENT OF FACTS**

This is an action brought under the bonding statute against Majestic Corporation, this defendant having failed to require bond of defendant Robert W. Pepper as required under 14-4-1, Utah Code Annotated, 1953.

The plaintiffs were laborers for Pepper upon a project owned by Majestic Corporation. Wages paid by defendant Pepper to plaintiffs by check failed to clear and were returned. Upon going to Dr. Roy Humphreys, president of Majestic Corporation, payment was obtained for the salary which had accrued since receiving their last payment by insufficient fund checks. Upon the demand of Dr. Humphreys releases and lien waivers were signed. The trial court held that such releases were not supported by consideration and, therefore, did not release the defendant Majestic Corporation from liability. The plaintiffs brought action against both Pepper and Majestic Corporation. Pep-

per failed to file a responsive pleading and a default judgment was entered.

### ARGUMENT

There is no question but that the Appellant Majestic Corporation failed to provide a bond as provided by law. (Tr. 193 lines 9-12) When checks paid by Pepper directly to employees failed to clear the bank, the lien waivers which had been signed at the time of the issuance of the checks would not be enforceable.

See *Brimwod Homes, Inc. v. Knudsen Builders Supply Co.*, 14 Utah 2d, 419; 385 P 2d, 982.

In this case, as the Court will recall, lien waivers were signed for advances made and future advances and it was held:

“Provision in ‘receipt and lien release’ that in consideration of payment of sum authorized by builder the materialmen waived, released and discharged any lien or right to lien that it might have or thereafter acquire against realty did not apply to any future lien rights which materialmen might acquire and related only to particular debt paid and receipted for in a particular transaction, and materialman’s claims of liens for remainder due were valid and it was entitled to assert and foreclose the same.”

In the instant case the workmen, as a matter of course, would sign the lien waiver and, of course, could not be held to them when their checks failed to clear the Pepper account.

Upon going to Dr. Humphreys, the officer for Majestic Corporation, the money was obtained for the number of hours worked since the last insufficient funds check was



given. (Tr. 194) where it was established that Pepper met with Humphreys and testified to the following conversation.

(By Mr. Ivins)

Q. "Did you reach any conclusion as to what you would do about it? (about the checks that had failed to clear the bank)

A. Yes, he would pay the wages, (referring to Dr. Humphreys) I mean, see, I paid them on the 15th, and he would pay from then until what was due. I mean, from then on up.

Q. Was that the agreement you had with the Doctor?

A. Yes, sir.

And, further (Tr. 195):

Q. As a result of these conversations, what did you do, Mr. Pepper?

A. Well, I was going to quit working for him, and the wages, the money I had coming, the contract money, he wouldn't—he wasn't going to give any of that to me. He would pay that amount out to the men. All the men.

Q. That would be the end of the job. So at the time you had your conversation with Dr. Humphreys he agreed there was money owing to you, is that correct?

A. That is right."

Thus, it is obvious that the money paid by Dr. Humphreys to these plaintiffs, for which he obtained releases, was pursuant to his agreement with his unbonded contractor Pepper. It is the contention of plaintiffs that the appellant did nothing more than he was legally obliged to do, both under the bonding statute and pursuant to his agreement with his contractor.



It is also established that the payments made to the plaintiffs were not made at a time sooner than they would have been paid to Pepper and then paid to plaintiffs. (See Pepper testimony Tr. 203)

(By Mr. Ivins)

Q. "According to your calculations, Mr. Pepper, have you been overpaid for the amount of work that you did on the Tooele job?

A. No.

Q. Now, as to the time of payment, Mr. Pepper, in the ordinary course of procedures on the Tooele job, how soon after you presented the invoice to the doctor did he pay you for that invoice?

A. About fifteen minutes is as long as it would take him to write it out.

Q. Upon presentment of the invoice by which these men were paid directly, did he pay you at that time? He didn't pay you, did he?

A. No, he didn't pay me.

Q. It was a day or two before he paid the plaintiffs, was it not?

A. It was later that day, or the following day.

Q. Were they paid any sooner by virtue of that invoice by the Doctor than they would have been paid if you had paid them?

A. No."

Thus, there is no valid argument that Majestic Corporation did anything other than what it was obliged to do with its contractor or that it made payment on an earlier date than ordinarily made and, therefore, there was no valid consideration to support the lien waivers and releases.

## POINT I

THERE HAS BEEN NO FINDING THAT THE PLAINTIFFS ARE ESTOPPED BY THEIR ACTION FROM ASSERTING CLAIM AGAINST THE DEFENDANT MAJESTIC CORPORATION.

The Findings and Conclusions of Judge Tuckett are:

1. That there was no consideration given for the releases and lien waivers.

2. That there was not an accord and satisfaction between the parties. The Judge made no findings regarding estoppel as pleaded by the defendant Majestic Corporation. It is respectfully submitted that the elements of estoppel would not apply in the instant fact situation and that Majestic Corporation, who is charged with knowledge of the law, was obliged to pay the wages which it paid and in insisting that before payment was made releases and lien waivers be signed was not subjected to any misrepresentation upon which it relied to its detriment.

## POINT II

THE PLAINTIFFS DID ESTABLISH A PRIMA-FACIA CASE FOR RELIEF AGAINST MAJESTIC CORPORATION.

The defendant Majestic Corporation has failed to carefully read the Transcript or it would not have presented Point II. Page 3 of Transcript reveals the stipulation which was entered into by counsel preventing the need of proving the number of hours worked or wages earned. (Tr. 3)

(Mr. Ivins)

"We have signed a written stipuation that the defendant will have available a defense of accord and satisfaction and also estoppel. I think Mr. Humphrey's attorneys have agreed that they will stipulate that the amounts of the checks that will be introduced that did not clear the bank will constitute the unpaid wages, and that the amount claimed for wages under these instruments would be a reasonable amount. Is that correct?"

(Mr. George E. Ballif)

"Yes, and that they do not exceed the agreed amounts for labor btween the plaintiffs and Pepper."

As to element of proof No. 1, this is without merit for the combined total of the unpaid checks of the plaintiffs themselves would constitute an amount in excess of \$500.00.

As to element 2, Dr. Humphreys' deposition reveals that there was no bond and Mr. Pepper so testified. (Tr. 193)

Proof of elements 3, 4, 5 and 6 as set forth on pages 9 and 10 of appellant's brief are supplied by such stipulation.

It would appear to me that this particular point is without merit and is propounded merely because defendant's attorney, who did not try the action, failed to read the transcript of the hearing.

### POINT III

PLAINTIFFS' RELEASES AND LIEN WAIVERS  
WERE WITHOUT CONSIDERATION AND, IN ACCORD

WITH CONTRACT LAW, NOT BINDING. THEREFORE BOTH DEFENDANTS ARE LIABLE; DEFENDANT PEPPER AS PLAINTIFFS' EMPLOYER, AND MAJESTIC CORPORATION UNDER THE BONDING STATUTE.

Frankly, respondent has some difficulty in following the argument propounded in Point III since we are dealing here with a matter of statutory liability on the part of a corporation who did not require a completion bond. If, as the trial court found, the releases and lien waivers were without consideration, they would not be binding upon the owner of the property and, therefore, they have no force and effect. Certainly if the release is not valid it is of no legal effect on any party.

#### POINT IV

THERE WAS NO ACCORD AND SATISFACTION NOR RELEASE AND SETTLEMENT AGREEMENT WHICH WAS SUPPORTED BY PROPER CONSIDERATION. THEREFORE, THE PLAINTIFFS ARE ENTITLED TO RECOVERY.

The court affirmatively found that there was no accord and satisfaction and evidence, which has been previously cited regarding Dr. Humphreys' statement that he would pay these men for the wages during the last week of work and that he would agree to the amount submitted to be the proper amount, deprives the appellant of the essential element of an accord and satisfaction, that is that a disputed amount is involved.

## POINT V

NO CONSIDERATION WAS GIVEN FOR THE RELEASES AND LIEN WAIVERS.

In support of this argument, I call your attention to 12 Am. Jur. Sec. 88, which states:

"The performance or promise of performance of a legal duty imposed by law or arising from a contract with the other party is insufficient consideration for a promise . . ."

Also, 12 Am. Jur. Sec. 89, p 583, which states:

"At an early date the rule that the performance of a legal obligation does not furnish a consideration for a contract was applied to a promise to discharge a liquidated debt upon the payment of a smaller sum on the day fixed by the contract or after default."

This conclusion has been generally adhered to and the rule thus established still prevails in most jurisprudence.

Also, Restatement of Contracts, Vol. I, Sec. 76. What Acts or Forebearances Are Sufficient Consideration For A Unilateral Contract.

"Any consideration that is not a promise is sufficient to satisfy the requirement of Sec. 10 (c), except the following

- (a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person;"

I feel that the fact situation in the case at hand is distinguishable from *Holbrook v. Webster's, Inc., et al*, 7 Utah 2d 148; 320 P 2d 661, which holds:

"An unambiguous release of materialmen's lien which was supported by a valuable consideration was not subject to being varied by parol.:

(underlining provided)

Another facet of the case at hand is that the employee plaintiffs, in this action, were under considerable pressure by virtue of having been unpaid for several weeks and it was only by virtue of the duress of the defendant president of Majestic Corporation that a lesser amount than the full amount owed was agreed to. I take the position that such action constitutes duress which would render the releases ineffective.

I call the Court's attention to 20 A.L.R. 2d 753, in which it is held that many courts have indicated that a threat to withhold wages of an employee unless he signs a release which he would not have signed otherwise, and which was not required as an incident to the payment of the wages, may constitute such duress as to render the release ineffective.

## CONCLUSION

If the Appellate Court supports Judge Tuckett's finding of a failure of consideration for the releases and lien waivers, the other defenses raised by appellant's attorney are then of no import for the stipulation entered into by counsel before the proceedings commenced resolved any

dispute about the wages having been earned and that they were reasonable.

Respectfully submitted,

HEBER GRANT IVINS

Attorney for Respondents